

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127
_____)	

COMMENTS OF SPRINT NEXTEL CORPORATION

Vonya B. McCann
*Senior Vice President
Government Affairs*

Charles W. McKee
*Vice President, Government Affairs
Federal & State Regulatory*

J. Breck Blalock
Director, Government Affairs

Sprint Nextel Corporation
900 7th Street, N.W., Suite 700
Washington, D.C. 20001

July 15, 2010

Table of Contents

I.	INTRODUCTION AND SUMMARY	2
II.	THE COMMISSION CAN BEST ACHIEVE ITS BROADBAND GOALS BY EXERCISING ITS AUTHORITY TO MAINTAIN A COMPETITIVE AND VIBRANT MOBILE BROADBAND MARKETPLACE	4
A.	A Vibrant Mobile Broadband Marketplace Will Foster Investment and Innovation and Protect Mobile Broadband Consumers	4
B.	The Commission Should Act Expeditiously to Address Threats to Competition in the Mobile Broadband Marketplace	6
C.	The Commission Can Implement These Priority Reforms and Address Other Issues with Its Existing Authority	10
III.	IF THE COMMISSION DECIDES TO CLASSIFY INTERNET CONNECTIVITY SERVICE AS A TELECOMMUNICATIONS SERVICE, THE COMMISSION SHOULD NARROWLY DEFINE THE SERVICE AND FORBEAR FROM APPLYING ALL BUT A HANDFUL OF TITLE II'S PROVISIONS.....	12
A.	The Commission Should Define "Internet Connectivity Service" Narrowly to Include Only the Network Elements and Functions Essential to Establish an Internet Connection	12
B.	The Commission Should Explicitly Enumerate Those Network Elements and Functions That Are Not Included in the Definition of "Internet Connectivity Service"	15
C.	The Commission Should Forbear from Applying All but a Handful of Title II Provisions to Internet Connectivity Service	17
IV.	THE COMMISSION SHOULD CONSIDER THE UNIQUE COMPETITIVE AND TECHNICAL CHARACTERISTICS OF MOBILE BROADBAND BEFORE EXTENDING ADDITIONAL REGULATION TO THE INDUSTRY	20
V.	CONCLUSION.....	22

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Framework for Broadband Internet Service)	GN Docket No. 10-127
_____)	

COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation (“Sprint”) submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Inquiry¹ seeking comment on the legal framework the Commission should employ when overseeing broadband Internet access services. The Commission has an important role to play in preserving broadband competition. Despite the recent *Comcast*² decision, the FCC retains significant jurisdictional authority to ensure competition in broadband. If the Commission determines, however, that it is necessary to classify “Internet connectivity service”³ as a telecommunications service to protect competition and address other issues, the Commission should forbear from applying all but a handful of Title II sections to broadband and recognize the distinct technical and legal characteristics of mobile broadband services.

¹ *Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010) (“NOI”).

² *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

³ The Commission in the NOI refers to the portion of broadband internet access service that may constitute a telecommunications service as “Internet connectivity service” or “broadband Internet connectivity service.” NOI at ¶1, n.1.

I. INTRODUCTION AND SUMMARY

Marketplace forces are the best tool the Commission has to promote innovation and investment in broadband and to ensure an open, consumer friendly Internet. It is important for the Commission to have the legal authority to enable and protect this competition. The current retail marketplace for mobile broadband services is vibrant and competitive.⁴ However, players with market power control certain essential inputs to these mobile broadband services and antiquated regulations are unnecessarily suppressing greater deployment and increasing costs for consumers.

To ensure that the marketplace for mobile broadband services continues to develop in a competitive manner, the Commission should act expeditiously to alleviate conditions that undermine mobile broadband competition by addressing unjust and unreasonable special access rates, terms, and conditions, stopping the inefficient transfer of wealth caused by an obsolete intercarrier compensation regime, and ensuring carriers continue to have interconnection obligations in an all IP world. The Commission should also ensure that mobile carriers have access to data roaming services, an important input to mobile broadband services, at just and reasonable rates, terms, and conditions.

The Commission continues to have broad jurisdictional powers to address competitive issues affecting the mobile broadband marketplace even after the *Comcast* decision. The *Comcast* decision did not restrict the Commission's jurisdictional authority, it merely reiterated the legal obligation to articulate a valid statutory mandate requiring the exercise of Title I jurisdiction. The Communications Act of 1934, as amended, ("Communications Act" or "Act") provides the Commission with

⁴ The Commission has raised the issue of reclassification for both traditional broadband services and mobile broadband services. Sprint has focused these initial comments on mobile broadband services.

unquestionable primary subject matter jurisdiction to address issues like special access pricing, intercarrier compensation, and IP interconnection that directly impact competition in broadband communications.

To address other issues that may be outside the Commission's direct statutory authority, the Commission also continues to have the ability to exercise ancillary jurisdiction, provided the subject matter falls within the Commission's general grant of jurisdiction and the regulation is necessary to perform effectively explicit mandated statutory responsibilities. With the Communications Act's primary subject matter jurisdiction and ancillary jurisdiction in hand, the Commission has broad power to shape the broadband industry even without classifying Internet connectivity service as a telecommunications service. For example, the Commission may well be able to address the issue of data roaming through its ancillary jurisdiction.

If, however, the Commission decides it is necessary to classify mobile Internet connectivity service as a telecommunications service, the Commission should narrowly define the service to include only the network elements and functions necessary to connect a consumer to the Internet. The Commission should make it clear that network management functions, content and applications, and managed and specialized services fall outside of the definition of Internet connectivity service. The Commission also should forbear from applying all but a handful of Title II's provisions to the service and should make it explicitly clear that the Commission's forbearance preempts any state regulation over those subjects from which the Commission has chosen to forbear.

Finally, the Commission should consider the unique characteristics of mobile broadband before deciding whether to apply new regulations to these services. Because

of their underlying network infrastructure and reliance on spectrum, mobile broadband networks present complex network management issues that the Commission should accommodate. For example, the Commission should not adopt any regulation that would adversely affect a mobile broadband operator's ability to address spectrum overuse or cell site crowding, or provide priority access to first responders or government officials during an emergency.

II. THE COMMISSION CAN BEST ACHIEVE ITS BROADBAND GOALS BY EXERCISING ITS AUTHORITY TO MAINTAIN A COMPETITIVE AND VIBRANT MOBILE BROADBAND MARKETPLACE

The retail marketplace for mobile broadband is currently competitive and this competition is the best tool the Commission can use to ensure investment and innovation in mobile broadband and to protect consumers. Moreover, the FCC has adequate primary subject matter jurisdiction to address the issues that raise the most immediate concerns for competitors and consumers in the mobile broadband marketplace – special access prices, intercarrier compensation, and IP interconnection arrangements. The Commission also continues to have ancillary jurisdiction to address other important inputs to competition in the mobile broadband market such as data roaming.

A. A Vibrant Mobile Broadband Marketplace Will Foster Investment and Innovation and Protect Mobile Broadband Consumers

The best method to promote investment and innovation in, and protect consumers of, broadband Internet access service is for the Commission to rely on marketplace forces. As Chairman Genachowski recently noted, “[c]ompetition is the lifeblood of a thriving economy. It motivates people to reach higher, take risks, be more creative, use

resources more efficiently. And it drives investment.”⁵ Competition fuels the virtuous circle of innovation, investment, adoption, and transformation the Commission is seeking to foster as it works to implement the *National Broadband Plan*.⁶

The current retail marketplace for mobile broadband is unquestionably vibrant and robust and consumer adoption of mobile broadband is on the rise. As the Commission observed recently, approximately 280 million people, or 98.1 percent of the U.S. population, are served by one or more mobile broadband providers while approximately 255 million people, or 89.5 percent of the U.S. population, are served by two or more mobile broadband providers.⁷ Simply put, most Americans have a choice among multiple mobile broadband providers.

The number of Americans subscribing to mobile services generally is even greater. According the Commission, there were 227.6 million mobile wireless subscribers at the end of 2008, which translates to a nationwide penetration rate of 90 percent.⁸ The Commission estimates 25 million terrestrial mobile wireless high-speed Internet access connections were in use by the end of 2008 and that mobile wireless connections “represented nearly 25 percent of the more than 102 million high-speed

⁵ Prepared Remarks of Chairman Genachowski, *America's Mobile Broadband Future*, at 8 (Oct. 7, 2009) (“Chairman’s CTIA Speech”).

⁶ For a more complete discussion of Sprint’s views regarding competition in the mobile broadband marketplace see Sprint Nextel Comments, GN Docket No. 09-191, WC Docket No. 07-54 (filed Jan. 14, 2010) at 9-12 (“Sprint Open Internet Comments”).

⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 14th Mobile Wireless Competition Report, FCC 10-81, at 7 (rel. May 20, 2010) (“14th CMRS Competition Report”).

⁸ 14th CMRS Competition Report at 89, ¶ 156.

connections in the United States in December 2008.”⁹ During that same period, the Commission estimated that there were approximately 86 million mobile devices in use capable of sending or receiving information at broadband speeds.¹⁰

Light touch regulation and retail competition in mobile services has led to tremendous innovation, investment and consumer adoption of mobile broadband. There continue to be, however, inputs to the retail market that are suppressing faster and wider deployment of mobile broadband services, as well as increasing costs to consumers. As Sprint has explained in previous comments, the benefits of competition in the mobile space are undermined by high special access charges, unfair intercarrier compensation regulation, and uncertainty about IP interconnection. These challenges to competition demonstrate that there remains an important role for the FCC in the broadband marketplace. The FCC currently has significant authority to address these issues and should act now to ensure continued robust competition in the marketplace.

B. The Commission Should Act Expeditiously to Address Threats to Competition in the Mobile Broadband Marketplace

It is crucial that the Commission have both the legal authority and political will to intervene where there are conditions that threaten competition in the mobile broadband marketplace. The *National Broadband Plan* calls on the Commission to “comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to . . . mobile

⁹ 14th CMRS Competition Report at 180, ¶ 341.

¹⁰ 14th CMRS Competition Report at 180, ¶ 341.

providers.”¹¹ Among the current threats to competition, the *National Broadband Plan* highlights three the Commission should address immediately: (1) the high cost of special access, (2) the unfair intercarrier compensation regime, and (3) the uncertainty surrounding IP interconnection obligations.¹² The *National Broadband Plan* also singles out mobile data roaming as important to entry and competition for mobile broadband services and encourages the FCC to move forward promptly in its proceeding on roaming obligations for data services provided without interconnection with the public switched network.¹³

Addressing special access charges will facilitate competitive growth in mobile broadband services. As the Commission in the 14th CMRS Competition Report explains the urgent need for Commission action:

“[c]onsumers are increasingly adopting Internet-connected mobile computing devices, such as smartphones, for purposes such as video and Internet browsing. Such data services consume greater amounts of bandwidth than traditional voice services, resulting in a greater need for backhaul capacity. Further, the rollout of 4G networks using Long Term Evolution (LTE) and WiMAX technologies, which support higher data throughput rates and lower latencies, will make access to sufficient backhaul for wireless service even more critical over time.”¹⁴

¹¹ *Federal Communications Commission, Connecting America: The National Broadband Plan* at 48 (“*National Broadband Plan*”).

¹² Sprint has previously detailed the adverse effects that these challenges place on competition in the mobile broadband space. *See, e.g.* Sprint Open Internet Comments at 12-15.

¹³ *National Broadband Plan* at 35, 49.

¹⁴ 14th CMRS Competition Report at 17.

The Commission continues “in light of the growing need for backhaul, cost-efficient access to adequate backhaul will be a key factor in promoting robust competition in the wireless marketplace.”¹⁵

By far, the vast majority of this backhaul requires that mobile broadband providers have nondiscriminatory access to special access and Ethernet circuits from LECs at just and reasonable rates. In fact, as Sprint noted in recent comments, over 98 percent of all DS1 circuits are purchased from incumbent local exchange carriers as are the vast majority of DS3 connections.¹⁶ Moreover, as the *National Broadband Plan* notes, the Commission has, since 2006, “deregulated many of the packet-switched, high-capacity Fast Ethernet and Gigabit Ethernet transport services offered by several incumbent LECs. Business customers, community institutions and network providers regard these technologies as the most efficient method for connecting end-user locations and broadband networks to the Internet.”¹⁷ Given the importance of special access and Ethernet to increasing competition in the mobile broadband space, it is essential that the Commission act expeditiously to address carriers with market power over these services and correct the anticompetitive rates, terms and conditions they impose.¹⁸

The second area the Commission must address to maintain a competitive marketplace for mobile broadband service is intercarrier compensation. The antiquated

¹⁵ 14th CMRS Competition Report at 160, ¶ 296.

¹⁶ Sprint Nextel Comments, WC Docket No. 05-25 (filed Jan. 19, 2010) at ii (“Sprint Special Access Comments”).

¹⁷ *National Broadband Plan* at 48.

¹⁸ Sprint has provided the Commission with a detailed discussion of how monopoly special access rates harm competition in the mobile marketplace. *See*, Sprint Special Access Comments, WC Docket No. 05-25 (filed Jan. 19, 2010).

intercarrier compensation regime currently in place stifles mobile broadband development and competition by subsidizing incumbent local voice carriers at the expense of mobile broadband providers. As the *National Broadband Plan* notes, the intercarrier compensation regime “has not been reformed to reflect fundamental, ongoing shifts in technology and consumer behavior, and it continues to include above-cost rates.”¹⁹ The system creates incentives for regulatory arbitrage and carrier conduct (for example, LECs requiring an interconnecting carrier to convert Voice over Internet Protocol calls to TDM calls in an attempt to improperly assess access charges) that ultimately inhibit the development and deployment of broadband networks. The Commission should immediately direct its resources and attention to intercarrier compensation reform and establish a framework to put an end to anticompetitive arbitrage practices.

The Commission also must clarify IP interconnection rights. As networks evolve and applications increasingly run on IP based protocols, the FCC should, as the *National Broadband Plan* recommends, clarify interconnection rights and obligations and encourage IP interconnection. “For competition to thrive, the principle of interconnection – in which customers of one service provider can communicate with customers of another – needs to be maintained.”²⁰ Accordingly, it is essential that the Commission clarify rights and obligations regarding interconnection and remove any regulatory uncertainty regarding this basic obligation. Carriers should be permitted to exchange traffic in IP format at technically feasible locations (that are not confined to

¹⁹ *National Broadband Plan* at 142.

²⁰ *National Broadband Plan* at 49.

ILEC calling areas or LATAs) and free from inflated access charges, giving consumers the benefit of more efficient IP network rather than preserving antiquated technologies.

Finally, as the Commission has noted, data roaming is an important element in ensuring that consumers have access to e-mail, the Internet and other broadband services outside the geographic regions served by their providers and is important to entry and competition for mobile broadband services.²¹ Moreover, “roaming can be particularly important for small and regional providers with limited network population coverage to remain competitive.”²² For competition to continue in the mobile broadband market, the Commission should extend automatic roaming to mobile broadband data.

C. The Commission Can Implement These Priority Reforms and Address Other Issues with Its Existing Authority

The Commission’s authority to address special access reform, intercarrier compensation reform, and IP interconnection is unquestionable, and the policy and competition gains to be realized through Commission action are undeniable. Likewise, the Commission can exercise ancillary jurisdiction to address access to data roaming services. It is well established that these inputs to the mobile broadband marketplace are currently subject to the Commission’s oversight under Title II and III of the Communications Act. And Commission action in these areas would have a transformative effect on the development of the nation’s mobile broadband infrastructure.

The *Comcast* decision did not change the law. Even after the *Comcast* decision, the Commission retains broad ancillary jurisdictional powers. The Commission may exercise ancillary authority under Title I if (1) the matter falls within the Commission’s

²¹ *National Broadband Plan* at 49.

²² 14th CMRS Competition Report at 75, ¶ 125.

general statutory grant of jurisdiction and (2) the regulation is reasonably ancillary to the effective performance of the Commission's statutorily mandated responsibilities.²³ Thus, many of the Commission's broadband regulatory aspirations can be supported under ancillary jurisdiction.

The *Comcast* court did make it clear, however, that the Commission must establish its ancillary jurisdiction based on precise, fact specific reasoning in the context of a concrete proposal directly linked to the exercise of specific statutory authority. In the NOI, the Commission has asked parties to handicap ancillary jurisdictional arguments supporting hypothetical actions the Commission might take in response to various conditions.²⁴ Sprint submits that the Commission has sufficiently identified the contours of the best ancillary jurisdiction arguments that can be crafted in each circumstance. If the Commission chooses to proceed relying on ancillary jurisdiction, the Commission must meticulously demonstrate that its proposed regulations, whatever they may be, are reasonably ancillary to the effective performance of the Commission's statutorily mandated responsibilities.

Given the scrutiny the courts will likely exercise in reviewing Commission assertions of ancillary jurisdiction, however, it may well be that some of the Commission's broadband policy aspirations are not obtainable through the exercise of ancillary jurisdiction. Nevertheless, Sprint is certain the Commission can sustainably enact substantial portions of the *National Broadband Plan* and achieve significant broadband policy gains through the careful exercise of Title I ancillary jurisdiction.

²³ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

²⁴ NOI at ¶¶ 30-50.

III. IF THE COMMISSION DECIDES TO CLASSIFY INTERNET CONNECTIVITY SERVICE AS A TELECOMMUNICATIONS SERVICE, THE COMMISSION SHOULD NARROWLY DEFINE THE SERVICE AND FORBEAR FROM APPLYING ALL BUT A HANDFUL OF TITLE II'S PROVISIONS

A. The Commission Should Define "Internet Connectivity Service" Narrowly to Include Only the Network Elements and Functions Essential to Establish an Internet Connection

If the Commission decides to define "Internet connectivity service" as a separate telecommunications service, the Commission should do so cautiously, defining the service narrowly to include only those network and functional elements that constitute transmission between the end user and the Internet. In the NOI, the Commission asks a number of questions regarding how to define the telecommunications service offered as part of "Internet connectivity service".²⁵ The Commission also asks commenters to identify the particular aspects of broadband Internet service that do not constitute "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."²⁶

Any definition of Internet connectivity service adopted by the Commission should include only those Internet connectivity elements and functions required to enable subscribers to transmit data communications to and from the rest of the Internet. As the Commission noted in the *Cable Modem Declaratory Ruling*, [a]t the most basic level, these functions include establishing a physical connection between the [broadband network operator's network] and the Internet by operation or interconnecting with

²⁵ NOI at ¶¶ 63-65.

²⁶ NOI at ¶ 65.

Internet backbone facilities. In addition, these functions may include . . . IP address number assignment, [and] domain name resolution through a domain name system.”²⁷

Sprint urges the Commission to adopt a narrow definition for Internet connectivity service that includes only those minimum network elements and functions essential to establish a line of transmission between the user and the Internet. This service would be defined as a telecommunications service subject to Title II of the Communications Act. The service should include the transmission component only at this time. While the Commission also may consider the inclusion of additional functions, such as domain name server (“DNS”) access or IP addressing, the addition of these functions have significant implications for the scope of the Commission’s decision and the definition of information services. Accordingly, it may be appropriate for the Commission to postpone inclusion of those aspects of internet transmission until the ramifications are more apparent.

While these functions are certainly necessary to enable consumers to enjoy full access to the Internet including processing or information elements, there may well be other avenues, such as through ancillary jurisdiction, for the Commission to address issues associated with these functions. If under certain fact specific circumstances, the Commission deems it necessary to regulate such functions in order to address threats to competition or specific markets, the Commission could do so by invoking ancillary jurisdiction or by capturing these functions as “adjunct” to Internet connectivity service.

²⁷ NOI at n. 178, quoting *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4809-11, ¶¶ 17-18 (2002) (“*Cable Modem Declaratory Ruling*”).

For example, in the Commission’s proceeding considering mobile broadband data roaming, several parties have argued that functions that may be essential to facilitate data roaming, such as IP address number assignment, DNS lookup, and/or other content or protocols that may be provided by the host network, are information services and therefore the Commission cannot extend mandatory roaming to mobile broadband data services.²⁸ Establishing Internet connectivity service as a telecommunications service, however, would provide the Commission with a Title II foundation to employ ancillary jurisdictional arguments, such as those outlined by commenters in the Commission’s mobile data roaming proceeding,²⁹ or adjunct services arguments. These arguments could be used to extend automatic mobile data roaming requirements to include information service components like DNS or IP address assignment.

As the Commission observes, “[i]n classifying services, the Commission has taken into account the purpose of the feature or services at issue. For example, some features and services that meet the literal definition of ‘enhanced service,’ but do not alter the fundamental character of the associated basic transmission service, are ‘adjunct-to-basic’ and are treated as basic (*i.e.* telecommunications) services even though they go beyond mere transmission.”³⁰

²⁸ Verizon Wireless Comments, WT Docket No. 05-265 (filed June 14, 2010) at 24-27 (“Verizon Data Roaming Comments”); AT&T Inc. Comments, WT Docket No. 05-265 (filed June 14, 2010) at 5, 27-28 (“AT&T Data Roaming Comments”).

²⁹ See, e.g., T-Mobile USA Inc. Comments, WT Docket No. 05-265 (filed June 14, 2010); SouthernLINK Wireless Comments, WT Docket No 05-265 (filed June 14, 2010).

³⁰ NOI at ¶ 59.

B. The Commission Should Explicitly Enumerate Those Network Elements and Functions That Are Not Included in the Definition of “Internet Connectivity Service”

Although the Commission should include in its definition of Internet connectivity service network elements and features sufficient to render meaningful its reclassification decision, the Commission also must be careful not to capture in the definition features and functions that carriers use to differentiate themselves in the marketplace. The Commission also should make *explicitly* clear the elements and functions that are *not* included in the Internet connectivity telecommunications service.

For example, the Commission lists a number of functions for possible inclusion in a definition for Internet connectivity that do not involve transmission between subscribers and the Internet, but rather relate to security, network management, and quality of service. Specifically, the Commission notes as possible candidate functions, network security and caching, network monitoring, capacity engineering and management, fault management, and troubleshooting.³¹ These functions are outside of and do not constitute "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Rather, these security, network management, and quality of service functions are higher level network functions that lie outside of the transmission layer, are often proprietary, and are the building blocks through which carriers differentiate themselves in the marketplace and assemble more sophisticated offerings such as managed services. Accordingly, they are not telecommunications services.

³¹ NOI at ¶ 64 n. 178.

In the NOI, the Commission also indicates its *intent* not to address “the classification of information services such as email hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or any other offering aside from broadband Internet service.”³² Similarly, the Commission stated that it does not *intend* to “address or disturb [its] treatment of services that are not sold by facilities-based Internet service providers to end users in the retail marketplace, including, for example, Internet backbone connectivity arrangements” and does not intend to “change its treatment of services that fall outside a commonsense definition of broadband Internet service.”³³

The Commission should go further than stating its intention to not consider services such as Internet backbone arrangements and managed services and explicitly exclude these services from the definition of Internet connectivity service. Explicitly enumerating a non-exhaustive list of the services not included in the definition of Internet connectivity service and providing guidance on how and under what process new services might be considered would put an end to speculation regarding the Commission’s intentions and would provide comfort to parties that the Commission does not intend to erect a slippery slope of Internet regulation. Moreover, the markets for web content and applications and special and managed services are fiercely competitive. To ensure continued innovation and investment in these services, the Commission must provide

³² NOI at ¶ 107.

³³ NOI at ¶ 107. The Commission has also recognized that other services such as IP based voice and subscription video services including managed and specialized services that may be provide over the same facilities used to provide broadband Internet services to consumers should not be subject to reclassification. Specifically the Commission acknowledges that these managed or specialized services may differ from broadband Internet services in ways that recommend a different policy approach, and it may be inappropriate to apply the rules proposed here to managed or specialized services. NOI at ¶ 108 citing Open Internet NPRM, 24 FCC Rcd at 13116-17, ¶¶ 148-53.

regulatory certainty and state unequivocally that these services lie outside the transmission component of Internet connectivity services and are information services.

C. The Commission Should Forbear from Applying All but a Handful of Title II Provisions to Internet Connectivity Service

Assuming the Commission decided to classify broadband Internet connectivity as a telecommunications service, the Commission seeks comment on the possibility of simultaneously forbearing from applying all but a handful of Title II's statutory provisions to the service.³⁴ Specifically, the Commission proposes to forbear from applying all but the following sections of the Communications Act:³⁵

Section 201 – carriers' rates, terms, and conditions must be "just and reasonable"

Section 202 – carriers must refrain from "unjust or unreasonable discrimination"

Section 208 – parties may file complaints with the Commission

Section 222 – carriers must protect the privacy of information that they obtain in providing telecommunications services

Section 254 – providing the framework for the Universal Service program

Section 255 – telecommunications services must be made accessible and usable by persons with disabilities to the extent "readily achievable"

In general, Sprint supports the proposition that the Commission should forbear from applying the vast majority of Title II's provisions, save those identified above, to broadband Internet connectivity service. However, the Commission may want to include among the sections not to be subject to forbearance, section 253, which provides the Commission with explicit authority to preempt state requirements that might prevent the provision of telecommunications services. The Commission should also consider whether to preserve certain portions of section 251 of the Act to insure that interconnection with the broadband transmission facilities of the incumbent local exchange carriers is required

³⁴ NOI at ¶ 68.

³⁵ NOI at ¶¶ 68, 74-86.

under reasonable terms and conditions.³⁶

As Chairman Genachowski correctly observed this approach is consistent with the “light touch” Title II regulation that has resulted in tremendous investment and advancement of commercial mobile communications to date:

In its approach to wireless communications, Congress mandated that the FCC subject wireless communications to the same Title II provisions generally applicable to telecommunications services while also directing that the FCC consider forbearing from the application of many of these provisions to the wireless marketplace. The Commission did significantly forbear, and the telecommunications industry has repeatedly and resoundingly lauded this approach as well-suited to an emerging technology and welcoming to investment and innovation.³⁷

Sprint concurs that the light touch regulatory approach that Congress and the Commission have crafted for mobile services has resulted in unprecedented investment and growth over the last several decades, and there is no credible reason to believe that investment and innovation in mobile broadband services will not continue if the Commission extends a similar light touch regulatory approach to mobile Internet connectivity service.³⁸

However, to ensure the success of this approach, the Commission should unequivocally establish that the regulatory regime it would adopt would preempt all state

³⁶ The *National Broadband Plan* notes that the facilities and interconnection provided for in section 251 are critical inputs used by both wireline and wireless providers to provision competitive broadband services to end users. *National Broadband Plan* at 47-49.

³⁷ *The Third Way: A Narrowly Tailored Broadband Framework*, Julius Genachowski, Chairman, Federal Communications Commission (May 6, 2010) at 6.

³⁸ Indeed, even opponents of reclassification have acknowledged that light regulation is not in itself a negative environment for investment: “Tom Tauke, Verizon’s Senior Vice President for Public Policy and External Affairs, told the House Judiciary Committee that “this approach produced what is arguably one of the greatest successes in this industry in the last twenty years—the growth of wireless services” — and it “will work” for wireline broadband as well.” *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, Austin Schlick, General Counsel, Federal Communications Commission (May 6, 2010) (“Schlick Memo”) at 5.

regulation of mobile broadband service. As the Commission's General Counsel Austin Schlick notes, "[e]xcessive state regulation is as threatening to the Internet as excessive federal regulation. The Commission, however, has broad authority to preempt inconsistent state requirements when they frustrate valid federal policies."³⁹

Sprint urges the Commission to exercise this authority and preempt in this proceeding any state regulation of mobile Internet connectivity service. Sprint agrees with the Commission that Section 10(e) of the Communications Act and the Supremacy Clause of the US Constitution provide the Commission with the authority to preempt state requirements that conflict with the Commission's regulation.⁴⁰

The Commission also should proceed with caution in forbearing from Section 253 of the Act, which provides an independent basis for the Commission to preempt state regulations that prohibit the provision of telecommunications services.⁴¹ The Commission should consider whether Section 253, which does not place any additional burdens on carriers, provides the Commission with additional preemptive authority that may be unnecessarily relinquished if the Commission prophylactically forbears from Section 253's application with respect to Internet connectivity.

³⁹ Schlick Memo at 9.

⁴⁰ NOI at ¶ 110.

⁴¹ 47 USC § 253(a), (d) states "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" and provides that the Commission shall preempt such a statute, regulation, or local requirement in certain circumstances.

IV. THE COMMISSION SHOULD CONSIDER THE UNIQUE COMPETITIVE AND TECHNICAL CHARACTERISTICS OF MOBILE BROADBAND BEFORE EXTENDING ADDITIONAL REGULATION TO THE INDUSTRY

If the Commission classifies Internet connectivity service as a telecommunications service, the Commission should consider the unique competitive and technical realities associated with commercial mobile services in deciding whether to extend any additional regulations to the mobile broadband industry. In most areas, competition will achieve the Commission's goals. In other areas, such as data roaming, the Commission may need to intervene to ensure competition continues.

As Sprint notes above, the retail mobile broadband marketplace is competitive. To attract subscribers, Sprint and many others are investing huge sums of both effort and treasure into deploying next generation networks and devices. This retail competition and investment remains the Commission's best tool for promoting the development and adoption of mobile broadband. Competition also protects consumers. In this competitive environment, wireless carriers have every incentive to ensure consumers have access to the lawful content and applications of their choice, the ability to connect a wide variety of equipment to the network, and to serve consumers in a transparent and non-discriminatory manner. Simply put, unhappy customers vote with their feet.

The Commission should cultivate these market derived benefits and protections by ensuring that mobile broadband providers have competitive access at just and reasonable rates to all necessary inputs, full interconnection access to other networks, and operate in an intercarrier compensation environment that encourages competition and discourages unfair regulatory arbitrage and wealth transfer from competitive mobile broadband providers to vertically integrated carriers.

Mobile broadband network providers require more flexibility than other broadband providers to manage the unique characteristics of their networks. Mobile broadband networks rely on a limited resource, spectrum, to provide service. The Commission should preserve mobile broadband network providers' ability to manage this resource. The Commission should not prevent mobile broadband providers from acting to address a situation where a small number of customers on a single cell site demand so much spectrum at a given time that other customers served by the same cell site might not be able to access desired or even essential content or applications, for example to make an E911 emergency call.

The Commission should also ensure that mobile broadband providers have the flexibility to provide priority access and direct spectrum resources on a temporary, local basis to first responders, government officials or other legitimate priority access customers during a local emergency. Similarly, the Commission also should make clear that a mobile broadband service provider can protect its customers, if necessary, by denying access to a content, application, or service provider when the mobile broadband provider has evidence that a particular provider is engaged in fraudulent or other commercially harmful activity such as installing malicious software or using such malware to direct Internet traffic.

Data roaming, however, remains an issue the Commission should address. As Sprint detailed in its comments in the Commission's proceeding considering data roaming, extending an automatic roaming obligation to mobile data is now needed to ensure that carriers can provide customers with the broadband services they expect wherever they may be located and at just and reasonable prices.

V. CONCLUSION

Robust competition fuels the virtuous cycle of innovation, investment, adoption, transformation, and consumer benefits the Commission is seeking to foster in implementing the *National Broadband Plan* and the Commission has an important role in ensuring continued competition. Regardless of the jurisdictional path the Commission chooses in exercising oversight of broadband communications, Sprint urges the Commission to address quickly those marketplace issues such as special access and intercarrier compensation that limit expansion of networks and increase costs for consumers. If the Commission determines that it must classify Internet connectivity service as a telecommunications service to achieve this goal, the Commission should forbear from applying all but a handful of Title II's provision as the Commission has done with CMRS. In addition the Commission should explicitly declare its intention to preempt state regulation over Internet connectivity service.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

/s/ Vonya B. McCann

Vonya B. McCann
*Senior Vice President
Government Affairs*

Charles W. McKee
*Vice President, Government Affairs
Federal & State Regulatory*

J Breck Blalock
Director – Government Affairs
(703) 592-8812

Sprint Nextel Corporation
900 7th Street, NW – Suite 700
Washington, DC 20001

July 15, 2010